85-742

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
Petitioner,

VS.

BARBARA A. BROCKLESBY, et al.,
and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: October 31, 1985

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QUESTION PRESENTED

Does the First Amendment permit a private citizen to be held liable without fault for accurately publishing a law of the United States?

ADDENDUM TO PARTIES TO THE PROCEEDING

Petitioner's parent, subsidiary and affiliated companies are as follows:

Jeppesen Sanderson, Inc.
The Times Mirror Company
Jeppesen & Co., GMBH

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jeppesen & Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 2, 1985.

PARTIES TO THE PROCEEDING

All parties to the proceedings below remain as petitioner or respondents in this proceeding.

Petitioner is Jeppesen & Company, a publisher of aeronautical charts and maps.

Respondents are plaintiffs Barbara A. Brocklesby, Nancy Evans, Estate of Frank Evans, Norma Lee Mobley Chapman, and World Airways, Inc., and defendant United States of America, with whom petitioner has an ongoing indemnity dispute.

OPINIONS BELOW

The initial opinion of the Court of Appeals, filed February 15, 1985, has been officially reported at 753 F.2d 794 and appears in Appendix A, hereto. The amended opinion of the Court of Appeals, filed August 2, 1985, has been officially reported at 767 F.2d 1288 and appears in Appendix B, hereto.

JURISDICTION

Jurisdiction in the District Court was pursuant to 28 U.S.C. §§ 1332(a)(1) and 1346(b). An amended judgment was entered against Jeppesen in the District Court on August 2, 1983 and Jeppesen timely filed its notice of appeal. The opinion of the Court of Appeals for the Ninth Circuit was filed on February 15, 1985. On August 2, 1985, the Court of Appeals denied a timely petition for rehearing en banc and filed an amended opinion. This petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

STATEMENT OF THE CASE

In this action, Jeppesen & Company, a publisher of aeronautical charts and maps, was held liable without fault for accurately republishing a government regulation which pilots are required by law to follow.

On September 8, 1973, a World Airways DC-8 cargo aircraft crashed while the crew was attempting to follow an allegedly defective Federal Aviation Administration (FAA) instrument approach procedure which was accurately depicted on a chart published by Jeppesen & Company (Jeppesen). Seven separate actions for property damage and wrongful death were filed against Jeppesen and the United States (Government). These actions were subseqently consolidated for trial.

An instrument approach procedure is designed to ensure a safe descent, under instrument weather conditions, from the enroute phase of flight to a point where a safe landing can be made. All instrument approach procedures for any United States civilian airport are designed by the FAA and incorporated into FAR Part 97 as regulations with the force and effect of law.[1] The FAA was solely responsible for designing and flight testing the instrument approach procedure which World 802 was attempting to follow at the time of the crash.[2] Pilots making an instrument approach to any airport in the United States are required by law to follow one of the standard instrument approach procedures prescribed for that airport by the FAA.[3]

When an instrument approach procedure has been designed by the FAA and reduced to words and numbers on an FAA Form 8260-5, Jeppesen translates the words and numbers into symbols on a map, graphically portraying the approach procedure in a manner easily understood by pilots. Because the approach procedure is a regulation, Jeppesen is required to graphically portray the Government's procedure exactly as designed by the Government.[4] Jeppesen, which has no authority to change or add to the procedure, accurately portrayed the FAA's approach procedure on its chart.[5] As the Court of Appeals observed:

> [T]he Jeppesen chart involved in this case accurately portrayed the instrument approach procedure provided by the Government. All of the defects in the Jeppesen chart stem from the Government's alleged failure to establish a safe instrument approach procedure.

(Appendix B at 9.)

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[1] RT 1858:8-23; FAR §97.20; *Tilley v. United States*, 375 F.2d 678, 680 (4th Cir. 1967). References throughout to "RT" are to Reporter's Transcript and to "CR" are to Clerk's Record.

[2] RT 2483:25-2484:10; 3852:18-22; 1856:11-1859:20.

[3] FAR 91.116(a); RT 1375:16-18; 1376:1-4; 2943:14-2944:4.

[4] RT 2591:10-21; 3852:23-3853:3; 3016:5-3017:1.

[5] RT 3892:1-9; 1859:21-1860:15; 4114:16-4115:6; 5694:11-22.

From the outset of the case, Jeppesen vigorously opposed any attempt to hold it strictly liable for defects in the Government's procedure, as opposed to defects in Jeppesen's depiction of that procedure. In a pre-trial motion, however, the District Court ruled that Jeppesen's chart was a "product" and that Jeppesen could be strictly liable for any defects therein.[6]

The basis for Jeppesen's liability was that the approach procedure itself, as designed by the FAA, was defective. At the end of the two-month liability trial, the court instructed the jury as follows:

> [I]f you find that Jeppesen's instrument approach chart is defective and that the defect was a proximate cause of the accident, you must find Jeppesen liable even if the defect exists only because you find that the FAA designed an approach procedure that you find is itself defective.[7]

The jury returned a liability verdict against Jeppesen and the District Court entered judgment against Jeppesen in the total sum of $12,785,580.81.[8]

On appeal, Jeppesen posed the question: "Can Jeppesen be held strictly liable for accurately publishing a regulation prescribed by the United States Government?" (Appellant's Opening Brief at 1.) Jeppesen argued that "the accurate dissemination of a regulation is protected by the First Amendment." (Appellant's Opening Brief at 39.) Plaintiffs contested this issue and briefed it on the merits. (Brief of Plaintiffs-Appellees at 39-41.)

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[6] CR 305; 311; 349. Labeling Jeppesen's chart a "product" meant that even if the FAA had taken every reasonable precaution to design a safe procedure and reasonably believed it had designed a safe procedure, and even if Jeppesen had taken every reasonable precaution to verify that the FAA had designed a safe procedure and reasonably believed that the FAA had designed a safe procedure, Jeppesen would nonetheless be liable if, upon hindsight, the jury concluded that the procedure as designed was unsafe. *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 434, 143 Cal.Rptr. 225, 573 P.2d 443 (1978).

[7] RT 6233:5-17.

[8] CR 468.

In its Reply Brief, Jeppesen argued that "the First Amendment protects a publisher from liability without fault." (Appellant's Reply Brief at 6.)

On February 15, 1985 the Court of Appeals for the Ninth Circuit filed an opinion affirming the judgment of the District Court. In relevant part, the Court of Appeals held that the First Amendment permitted the regulation of commercial speech to protect the public from false and misleading commercial messages and that liability without fault would have no "significant" chilling effect on freedom of speech. (Appendix A at 13-14.)

Jeppesen timely filed a petition for rehearing in which it observed that the Court of Appeals had overlooked Jeppesen's argument that "no one should be liable for accurately publishing a law." (Petition for Rehearing and Suggestion for Rehearing En Banc at 3.) As part of its suggestion for rehearing en banc, Jeppesen argued:

> *Issue of Exceptional Importance:* The opinion in this case holds that a publisher may be liable without fault for accurately publishing a regulation of the United States. Yet the United States Supreme Court has consistently rejected attempts to impose strict liability on publishers because such liability would have a catastrophically chilling effect on First Amendment freedoms. . . . [¶] . . . Imposing upon a blameless person a choice between financial security through silence and potential financial catastrophe if he speaks the truth leaves freedom of speech not merely chilled, but fast-frozen.

(*Id.* at 7-8.)

On August 2, 1985 the Court of Appeals withdrew its previous disposition, filed an amended opinion and denied Jeppesen's petition for rehearing. Although all parties had briefed the issue on the merits and the Court of Appeals had addressed the issue directly in its original opinion, the amended opinion declined to address the First Amendment issue on the ground that it had not been raised in the District Court. The opinion nonetheless reiterated the Court of Appeals' observation that if Jeppesen wished to

avoid liability, it could "refrain from selling the product." (Appendix B at 14.) The First Amendment issue is properly before this Court. *Hormel v. Helvering,* 312 U.S. 552, 555-59 (1941); *Egan v. Teets,* 251 F.2d 571, 576 (9th Cir. 1957).

Following the Court of Appeals decision on the petition for rehearing, Jeppesen satisfied the judgment, expressly preserving its right to seek review in this Court under the authority of *Cahill v. New York, New Haven & Hartford Railroad Co.,* 351 U.S. 183, 184 (1956); *County of Dakota v. Glidden,* 113 U.S. 222, 224 (1885); *United States of America for the Use of Morgan & Son Earth Moving, Inc. v. Timberland Paving & Construction Co.,* 745 F.2d 595, 598 (9th Cir. 1984), and cases cited therein.

REASONS FOR GRANTING THE WRIT

For the first time in the history of American jurisprudence a court has held that a commercial publisher may be liable without fault for the accurate publication of a governmental regulation.[9] This decision will limit public access to constitutionally protected information.

1. This Court Should Declare That the First Amendment Protects the Accurate Publication of Laws and Government Regulations

The dissemination of laws and regulations is an activity encouraged by the First Amendment.[10] As this Court has stated:

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[9] Jeppesen has previously been held strictly liable for defects in its graphic presentation of information as opposed to defects in the information itself. *See Saloomey v. Jeppesen & Co.,* 707 F.2d 671 (2nd Cir. 1983); *Aetna Cas. & Surety Co. v. Jeppesen & Co.,* 642 F.2d 339 (9th Cir. 1981); *Fluor Corp. v. Jeppesen & Co.,* 2 Civ. 64134 (Cal. 1985), petition pending; *Times Mirror Co. v. Sisk,* 593 P 2d 924 (Ariz. 1978). As the Court of Appeals recognized, these decisions are distinguishable because the Jeppesen chart involved in this case accurately portrayed a defective instrument approach procedure designed by the Government. Appendix B at 9.

[10] The Court of Appeals' determination that Jeppesen's chart is a "product" does not change the fact that Jeppesen's chart is a publication

> The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

Unlike cases in which this Court is called upon to determine whether the First Amendment protects expressions which are not clearly speech, or speech which is on the periphery of societal interest, this case involves speech which goes to the heart of a democracy: the dissemination of laws and governmental regulations. This case presents a unique opportunity for the Court to affirm that the First Amendment is not shaped like a donut, protecting the outer boundaries of speech while not protecting speech essential to an informed democracy.

2. The Decision Below Conflicts with This Court's Decisions Which Hold That the First Amendment Does Not Permit a Publisher of Information to Be Found Liable Without Fault

This Court has consistently held that a publisher of information may not be liable without fault. *See Gertz v. Welch,* 418 U.S. 323, 340 (1974); *Time v. Hill,* 385 U.S. 374, 387 (1967); *New York Times Company v. Sullivan,* 376 U.S. 254, 278-79 (1964). As the Court explained:

> Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.

Gertz, 418 U.S. at 340.

The decision of the Court of Apeals in this matter is in conflict with the principles enunciated by this Court concerning strict

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which communicates laws and government regulations to those who are required to obey them.

liability for publication of information. Jeppesen republished the FAA procedure exactly as prescribed by the FAA, but in a form more easily understood by pilots. The Ninth Circuit held that Jeppesen could be liable without fault, expressly offering Jeppesen the option to "refrain from selling" aviation charts. The Court of Appeals' *express* invitation to self-censorship is so offensive to the First Amendment and to the principles enunciated in *Gertz* that it requires reversal.

3. The Decision in This Case Imperils Freedom of Speech by Inhibiting Mass Distribution of Information

The rule adopted by the Court of Appeals in this case has consequences which extend far beyond its application to the parties before the Court. The Court of Appeals held:

> Jeppesen argues that it is unfair to hold a chart manufacturer strictly liable for accurately republishing a government regulation. We agree. If, for example, a trade journal had accurately published the government's instrument approach procedure in text form and a pilot had used the procedure as printed in the journal, the journal would be immune from strict liability. This case, however, does not present that situation. Jeppesen's charts are more than just a republication of the text of the government's procedures. Jeppesen converts a government procedure from text into graphic form and represents that the chart contains all necessary information.

(Appendix B at 14.)

Under the Court of Appeals' rationale, any person who accurately republishes information prepared by another in a different form would no longer be entitled to the protection of the First Amendment. In this case, the Court of Appeals held Jeppesen liable without fault for converting printed words into graphic form even though the message conveyed was unchanged. This rationale is equally applicable to anyone who converts oral speech into printed words or printed words into computer impulses.

Under the Court of Appeals' decision, many commercial publishers could be held liable without fault for defects in information

supplied by others. A newspaper which accurately republishes a technical National Weather Service forecast in a graphic form easily understood by its readership could be held liable without fault if fishermen are injured as the result of an unpredicted storm.[11] A farm journal which publishes tables of recommended pesticide or herbicide concentrations prepared from information developed by the Department of Agriculture could be held liable without fault if that information later proves to be incorrect and farmers sustain crop damage as a result. A publisher of judicial decisions who transformed written opinions into computer impulses could be held liable without fault if an opinion contained a defamation.[12]

Until the decision in this case, the only decisions to have addressed the issue concluded that publishers cannot be held liable without fault for accurately publishing "defective" information created by another. *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802 (S.D.Texas 1983) (magazine publisher could not be liable without fault for a "defect" in the informational content of the magazine); *Walter v. Bauer*, 439 N.Y.S.2d 821 (1981), *modified on other grounds*, 451 N.Y.S.2d 533 (1982) (publisher of an elementary school science textbook could not be liable on a theory of strict product liability for a "defective" experiment because the intellectual content of the book was not a "product"); *Cardozo v. True*, 342 So.2d 1053 (Fla. 1977) (book store could not be liable on a breach of warranty theory for a "defective" recipe contained in a cookbook which it sold). As the New York court stated:

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[11] While a private publisher was not a party, the United States was held liable for its own negligence under these facts in *Brown v. United States*, 599 F.Supp. 877 (D.Mass. 1984).

[12] In *Beary v. West Publishing Co.*, 763 F.2d 66, 68-69 (2nd Cir. 1985), *cert. denied*, ____ U.S. ____ (1985), the Court of Appeals for the Second Circuit determined that a private reporter of judicial opinions in written form could not, as a matter of public policy, be liable for a defamation which the reporter accurately republished. Under the Ninth Circuit's rationale, West could be liable without fault for accurately transmitting the defamation to the thousands of attorneys subscribing to its "Westlaw" computer service.

> [T]he danger of plaintiff's proposed theory is the chilling effect it would have on the First Amendment—Freedoms of Speech and Press. Would any author wish to be exposed to liability for writing on a topic which might result in physical injury? e.g., How to cut trees; How to keep bees?

Walter v. Bauer, 439 N.Y.S.2d at 823.

This Court, too, has previously recognized that a book may not be treated the same as any other product for purposes of strict liability.

> There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter .... The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The booksellers' self-censorship, compelled by the State, would be a censorship affecting the whole public ....

Smith v. California, 361 U.S. 147, 152-54 (1959).

The Court of Appeals' decision will have an inhibiting effect on the flow of information to the public as great as that of the ordinance invalidated in *Smith*. The opinion below advocates self-censorship when it states that if Jeppesen wishes to avoid liability, it may refrain from publishing. No publisher will publish information which has the remotest chance of injuring someone, for fear that at some time in the future a jury will declare the information "defective" and find the publisher liable without fault.[13] If this Court permits the decision below to stand, many publishers will

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[13] See note 6, *supra.*

undoubtedly accept the Court of Appeals' invitation to "refrain" from publishing.

The foregoing applies with even greater force to publishers of laws and government regulations who are forbidden to alter or modify the information they publish. For these publishers, the only options are to publish at their peril or forego publishing. The decision in this case will limit public access to information relating to the functioning of government—the very information the First Amendment was intended to protect.

CONCLUSION

So long as the decision below remains in force, the public's access to constitutionally protected information will be restricted as publishers limit their publications to information they can be sure will not have injurious consequences. This will be especially true for publishers of laws and government regulations who are forbidden to alter or modify the information they publish. The Court should avail itself of this opportunity to affirm that the First Amendment will not permit a private citizen to be held liable without fault for accurately publishing a law of the United States.

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(Appendices follow)

Appendix A

United States Court of Appeals

For the Ninth Circuit

C.A. No. 83-2336

D.C. Nos. CV 74-1874, 74-1875, 74-1913, 75-0389, 75-1069, 75-1937, 76-0161 SC

Barbara A. Brocklesby, et al.,
Plaintiffs-Appellees,

vs.

United States of America,
Defendant-Appellee,

and

Jeppesen and Company,
Defendant-Appellant.

OPINION
[Filed Feb. 15, 1985]

Argued and Submitted—December 11, 1984

Appeal from the United States District Court
for the Northern District of California
Honorable Samuel Conti, District Judge, Presiding

Before: CANBY, NORRIS and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Barbara Brocklesby, Nancy Evans, Frank Evans, Katherine Evans, Norma Chapman, and World Airways, Inc. (collectively "the plaintiffs") brought this action against the United States of America ("the Government") and Jeppesen and Company ("Jeppesen"), seeking damages for wrongful deaths and property damage arising from an airplane crash near Cold Bay, Alaska. In a bifurcated trial, the jury returned a verdict against Jeppesen. Before the district court disposed of claims against the Government, the Government settled with the plaintiffs. An order dismissing the Government was entered. Jeppesen appeals from

the jury verdict and seeks indemnification from the Government. We affirm.

I

BACKGROUND

On September 8, 1973, an aircraft owned by World Airways crashed into a mountain near Cold Bay Alaska, killing all six crew members and destroying the aircraft and its contents. World Airways and the survivors of the deceased crew members brought separate actions against the Government and Jeppesen, alleging, *inter alia,* that the accident was caused by defects in an instrument approach procedure developed by the Government and published by Jeppesen. The actions were consolidated for trial.

The Federal Aviation Administration ("FAA") designs and publishes standard instrument approach procedures. *See* 14 C.F.R. pt. 97. The FAA's instrument approach procedures are essentially compilations of data, which are set forth in tabular form. Jeppesen uses the FAA's data to portray the instrument approach procedures in graphic form. One of Jeppesen's charts depicts the instrument approach procedure to the Cold Bay, Alaska airport. On the flight at issue in this case, World Airways' pilot was using that chart.

Prior to trial, the Government and Jeppesen entered into a stipulation of compromise settlement ("the indemnity agreement"). The indemnity agreement resolved the claims between the Government and Jeppesen, subject to various conditions. One of the conditions required the parties to submit special interrogatories to the trier of fact. Over the defendants' objections, the district court admitted the indemnity agreement into evidence.

Because the claims against the Government were governed by the Federal Tort Claims Act, the plaintiffs had no right to a jury trial on those claims. *See* 28 U.S.C. § 2402. As a result, the trial was bifurcated, with a jury deciding the claims against Jeppesen and the court deciding the claims against the Government. The case was submitted to the jury under three theories: negligence, breach of warranty, and strict liability. The jury returned a general

verdict against Jeppesen in the amount of $11,630,000. The district court refused to submit special interrogatories to the jury involving the indemnity issues and later refused to answer the interrogatories itself.

Shortly after the district court refused to submit the interrogatories to the jury, the Government settled with the plaintiffs for $5 million. The Government was then dismissed from the suit. The district court denied a motion by Jeppesen to enforce the indemnity agreement.

The district court awarded prejudgment interest in the amount of $6,155,580.81 to World Airways with regard to its claim for the market value of the aircraft. After crediting the $5 million settlement, the district court entered a final judgment for $12,785,580.81 in favor of the plaintiffs and against Jeppesen.

II

ANALYSIS

A. *The Indemnity Agreement*

1. *Admissibility*

Federal Rule of Evidence 408 bars the admission of settlement agreements to prove liability. *See generally* 23 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5301-5315 (1980). The final sentence of Rule 408 provides the exception that is at issue in this case: "This rule . . . does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . ." Jeppesen contends that the only purpose for admitting the indemnity agreement was to prove liability and that the district court abused its discretion by allowing the plaintiffs to introduce it into evidence.[1]

The record does not support Jeppesen's position. At trial, the plaintiffs argued that the indemnity agreement was admissible for

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[1] We review the district court's decisions regarding the admission of evidence under the abuse of discretion standard. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258 n.5 (9th Cir. 1984).

two purposes. First, the plaintiffs argued that the indemnity agreement was admissible to show the relationship of the parties. The plaintiffs contended that the indemnity agreement showed that Jeppesen and the Government were not adverse.[2] Second, the plaintiffs argued that the indemnity agreement was admissible to attack the credibility of the witnesses for Jeppesen and the Government.[3] The district court admitted the indemnity agreement for those specific purposes.[4] Because those purposes are

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[2] Jeppesen argues that the relationship of the parties was not at issue. The test, however, is not whether the relationship of the parties was an operative fact in the case, but whether it was "relevant" within the meaning of Rule 401. Evidence relating to the relationship of the parties is relevant because it tends to make their respective positions less credible. *See Lewis v. Baker,* 526 F.2d 470, 475 (2d Cir. 1975). At a post-trial hearing, Jeppesen's trial counsel admitted that the indemnity agreement altered the relationship between the Government and Jeppesen:

> We didn't shoot at the government. I dropped two expert witnesses on the subject of the government's procedure in reliance on the fact that the government was going to pay if the jury found the procedure was bad.
>
> I argued in favor of the government, I supported their position, I didn't prosecute, *but the jury knew about the agreement the whole time, so nobody was fooled.* The jury knew from opening statements what our relationship was.

(emphasis added).

[3] Jeppesen argues that the indemnity agreement was not used for this purpose. The record reveals, however, that the indemnity agreement was introduced into evidence during the testimony of Wayne Rosenkrans, the president of Jeppesen. In any event, it was not necessary for the plaintiffs to confront each witness with the indemnity agreement. If the existence of the indemnity agreement made the defendants' witnesses' testimony less credible, it was admissible. *See County of Hennepin v. AFG Industrites, (sic) Inc.,* 726 F.2d 149, 152-53 (8th Cir. 1984); 23 C. Wright & K. Graham, *supra,* § 5311.

[4] Jeppesen asserts that the district court allowed the plaintiffs to use the indemnity agreement for any purpose. The record reveals, however, that the district court admitted the indemnity agreement only for these

distinct from proving liability, the district court did not abuse its discretion by admitting the indemnity agreement.[5]

2. *Limiting Instruction*

Jeppesen contends that the district court committed reversible error by failing to instruct the jury that it could not consider the indemnity agreement as proof of liability. If a limiting instruction is not requested, any error from failure to give the instruction is waived. *Bock v. United States*, 375 F.2d 479, 480 (9th Cir. 1967); *see* Fed. R. Civ. P. 51. Because Jeppesen failed to request an instruction, this issue was not preserved for appeal.[6]

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two limited purposes. The record also reveals that Jeppesen never sought a limiting instruction, as is discussed below.

[5] Jeppesen also argues that the admission of the indemnity agreement was unfairly prejudicial because the jury could hold Jeppesen liable under the belief that the Government would indemnify Jeppesen. While that theory is not implausible, we note that Jeppesen did not contest the introduction of the indemnity agreement on the basis of unfair prejudice. *See* Fed. R. Evid. 403. Instead, Jeppesen based its objection solely on Rule 408 and general principles of relevance. Jeppesen never even mentioned unfair prejudice at trial. In fact, Jeppesen raised the issue of unfair prejudice for the first time in a motion filed after trial. In the absence of a specific and timely objection, we review the admission of evidence for plain error. Fed. R. Evid. 103(a)(1), (d); *see United States v. Wilson*, 690 F.2d 1267, 1273-74 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 205 (1983); *cf. John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977) (implying an objection under Rule 403 from a party's arguments under Rule 408). We conclude that the district court's decision to admit the indemnity agreement was not plain error.

[6] Jeppesen argues that its failure to request the instruction can be excused because the plaintiffs sought an identical instruction, which the district court rejected. The record does not support that argument. The "instruction" that the plaintiffs sought was part of the district court's initial statement to the jury prior to voir dire. None of the parties sought a limiting instruction at the time the evidence was admitted or at any other time.

3. *Enforceability*

Jeppesen claims that the district court erred by refusing to enforce the indemnity agreement. 28 U.S.C. § 1346(a)(2) gives district courts concurrent jurisdiction with the United States Claims Court over "[a]ny civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States." Because Jeppesen's claim against the United States under the indemnity agreement exceeds $10,000, the district court lacked jurisdiction. *Murray v. United States,* 405 F.2d 1361, 1366-67 (D.C. Cir. 1968); *see Keene Corp. v. United States,* 700 F.2d 836, 845 n.13 (2d Cir.), *cert. denied,* 104 S. Ct. 195 (1983); *Glover v. Johns-Manville Corp.,* 662 F.2d 225, 230-32 (4th Cir. 1981).

Because the issue of indemnity was not before the jury, the district court was not obligated to submit interrogatories on that issue. The district court concluded that submission of the interrogatories would be confusing and would create a possibility of inconsistent verdicts. The record reveals no grounds for finding that the district court abused its discretion.

4. *Due Process*

Jeppesen contends that the trial of this case was so fundamentally unfair that Jeppesen did not receive due process of law. We disagree. Jeppesen had a full and fair opportunity to present its case before the district court. If Jeppesen felt that the admission of the indemnity agreement was unfair, a timely and specific objection under Rule 403 or a request for a limiting instruction would have been appropriate.

Jeppesen also argues that the admission of the indemnity agreement deprived it of due process because the indemnity agreement eventually became unenforceable. Jeppesen contends that the trial was thus based on false evidence. We disagree. The indemnity agreement was admitted to show the relationship of the parties and to impeach witnesses. At the time of trial, the indemnity agreement was an accurate reflection of the relationship of the parties and the biases, if any, of the witnesses. While the indemnity agreement would have been "false" if it had been admitted to prove that the Government would indemnify Jep-

pesen, it was not admitted for that purpose. We reject Jeppesen's due process claims.

B. *Liability*

The case was submitted to the jury on three theories of liability: strict liability, breach of warranty, and negligence.[7] The jury returned a general verdict against Jeppesen. Accordingly, the judgment must be reversed if any of the three theories is legally defective. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Jones v. Miles*, 656 F.2d 103, 106 (5th Cir. 1981). Jeppesen argues (1) that this case does not involve a defective "product" for purposes of strict liability, (2) that the defects in the Government's instrument approach procedure will not support a finding of strict liability against Jeppesen, (3) that the evidence produced at trial does not establish negligence, and (4) that various policy considerations bar any tort liability in this case.[8]

1. *Strict Products Liability*

a. *The Existence of a "Product"*

Jeppesen argues that the Government's instrument approach procedure is not a "product" within the meaning of *Restatement (Second) of Torts* § 402A (1965). While that may be true, it misses the point. The issue is whether Jeppesen's chart is a product, not whether the instrument approach procedure is a product. In *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 642

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[7] Although the district court never made a finding regarding its choice of law, the parties assume that California law applies. California conflict of laws principles govern this choice. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). We conclude that the California courts would apply California law to this case. *See Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972). *See generally* R. Weintraub, *Commentary on the Conflict of Laws* § 6.29 (2d ed. 1980) (discussing choice of law problems in products liability cases).

[8] Jeppesen only challenges the breach of warranty theory on the ground that the chart was not a "product."

F.2d 339, 341-42 (9th Cir. 1981) (applying Nevada law), we analyzed the problem as follows:

> Jeppesen approach charts depict graphically the instrument approach procedure for the particular airport as that procedure has been promulgated by the Federal Aviation Administration (FAA) after testing and administrative approval. The procedure includes all pertinent aspects of the approach such as directional heading, distances, minimum altitudes, turns, radio frequencies and procedures to be followed if an approach is missed. The specifications prescribed are set forth by the FAA in tabular form. Jeppesen acquires this FAA form and portrays the information therein on a graphic approach chart. This is Jeppesen's "product."

Accord Saloomey v. Jeppesen & Co., 707 F.2d 671, 676-77 (2d Cir. 1983) ("Though a 'product' may not include mere provision of architectural design plans or any similar form of data supplied under individually-tailored service arragements, . . . the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts.") (applying Colorado law). We agree with the plaintiffs' position that Jeppesen's chart was a defective product for purposes of analysis under section 402A.[9]

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[9] Jeppesen cites several cases for the proposition that published ideas are not "products." *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802, 803 (S.D. Tex. 1983) (magazine article); *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App.) (recipe in a cookbook), *cert. denied*, 353 So. 2d 674 (Fla. 1977); *Walter v. Bauer*, 109 Misc. 2d 189, 439 N.Y.S.2d 821, 822 (Sup. Ct. 1981) (experiment in textbook), *modified on other grounds*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982). *See generally* McCowan, *Liability of the Chartmaker*, 47 Ins. Counsel J. 359 (1980). *Cardozo*, *Walter*, and *Herceg* stand for the proposition that books and magazines are not rendered defective by their contents. As a result, those cases are distinguishable. The plaintiffs are alleging that the chart was unreasonably dangerous in its intended use because of design defects. In *Cardozo*, *Walter*, and *Herceg*, on the other hand, the books and magazines were not dangerous for their intended use. *E.g.*, *Walter*, 439 N.Y.S.2d at 822 (noting that the plaintiff "was not injured by use of the book for the purpose for which it was designed, i.e., to be read"). By

b. *Liability for Defects in the Government's Procedure*

This case is distinguishable from *Aetna* and *Saloomey* because the Jeppesen chart involved in this case accurately portrayed the instrument approach procedure provided by the Government. All of the defects in the Jeppesen chart stem from the Government's alleged failure to establish a safe instrument approach procedure. The district court instructed the jury as follows:

> Now, the fact that Jeppesen's instrument approach charts are based on information which is supplied by the F.A.A. and which Jeppesen cannot deviate from or modify does not relieve Jeppesen from liability if a defect in the Jeppesen chart was a proximate cause of the accident. The manufacturer of a product is strictly liable for defects in that product even though the defect can be traced to a component part supplied by another. Thus if you find that Jeppesen's instrument approach chart is defective and that the defect was a proximate cause of the accident, you must find Jeppesen liable even if the defect exists only because you find that the F.A.A. designed an approach procedure that you find is itself defective. The issue is: was the Jeppesen chart defective?

The validity of that instruction presents a case of first impression.

Jeppesen contends that strict liability is inappropriate because the Government's procedure was beyond its control.[10] In essence, Jeppesen is arguing that it should not be held strictly liable

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contrast, Jeppesen's chart was allegedly dangerous for the use for which it was designed. *See Saloomey,* 707 F.2d at 676-77.

[10] Jeppesen's position resembles the "contract specifications" defense. Under the contract specifications defense, a manufacturer cannot be held liable for producing a product in accordance with specifications that are beyond its control. *See* Note, *Liability of a Manufacturer for Products Defectively Designed by the Government,* 23 B.C.L. Rev. 1025, 1032-48 (1982). The California courts have rejected the application of this defense to strict liability claims. *Rawlings v. D.M. Oliver, Inc.,* 97 Cal. App. 3d 890, 896-97, 159 Cal. Rptr. 119, 121-22 (1979); *accord Challoner v. Day & Zimmerman, Inc.,* 512 F.2d 77, 82-83 (5th Cir.), *vacated on other grounds,* 423 U.S. 3 (1975); *see* Note, *supra,* at 1039-43.

because it is without fault in this case. It is beyond doubt that the concept of fault continues to have a role in strict liability law. *See* Powers, *The Persistence of Fault in Products Liability,* 61 Texas L. Rev. 777 (1983). Nevertheless, Jeppesen's position is untenable.

Initially, we note that Jeppesen had at least some ability to prevent injuries to users of its charts. Jeppesen's production specifications manual required its employees to research any procedure thoroughly "to determine its validity and completeness." Jeppesen's president, Wayne Rosenkrans, testified that this requirement applied to the construction and composition of charts such as the one involved in this case. Jeppesen's manual requires its employees to contact official sources to resolve apparent discrepancies in information. Jeppesen maintained an office in Washington, D.C. with liaison to the FAA. Rosenkrans testified that Jeppesen's actions had led to changes in Government procedures. Accordingly, Jeppesen had both the ability to detect an error and a mechanism for seeking corrections. Under these circumstances, we reject Jeppesen's argument that the Government's procedure was completely beyond Jeppesen's control.

More fundamentally, however, existing products liability law is contrary to Jeppesen's position. Assuming that the Government's instrument approach procedure was defective, the literal requirements of section 402A are met. Jeppesen's chart was a "product in a defective condition unreasonably dangerous to the user" within the meaning of section 402A(1). Section 402A(2)(a) provides that strict liability is appropriate even though "the seller has exercised all possible care in the preparation and sale of his product." A seller is strictly liable for injuries caused by a defective product even though the defect originated from a component part manufactured by another party. *E.g., Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964); *see Prosser and Keeton on the Law of Torts* § 100, at 705 (W. Keeton 5th ed. 1984). Accordingly, the appropriate focus of inquiry is not whether Jeppesen caused the product to be defective, but whether the product was in fact defective. *See Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962).

The concept of fault has persisted in substantive products liability law primarily in determining whether a defective product is "unreasonably dangerous." *See* Powers, *supra*, at 781-97. We note that the California courts have sought to purge the concept of fault from strict liability law by focusing on the existence of a defect, rather then (sic) inquiring whether the product is unreasonably dangerous. *E.g., Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 422-26, 573 P.2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 127-35, 501 P.2d 1153, 1158-63, 104 Cal. Rptr. 433, 438-43 (1972). To the extent that Jeppesen's product was defective, the case law does not support an attempt to relieve Jeppesen of liability on the ground that the defect was not Jeppesen's fault. Comment *c* to section 402A of the *Restatement (Second) of Torts* states the policies underlying strict products liability as follows:

> [T]he justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the product.

See also Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring). All of those policies apply to the plaintiffs' claim in this case. To the extent that Jeppesen is held liable for the Government's misfeasance, Jeppesen had a right to seek tort law indemnification.[11] The fact

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[11] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983); *see* 28 U.S.C. § 2674. Of course, the Government is not subject

that Jeppesen failed to seek tort law indemnification has no bearing on the plaintiffs' substantive rights.

c. *Sufficiency of the Evidence*

Jeppesen contends that the evidence presented at trial did not prove that the chart was defective. The plaintiffs produced evidence regarding several alleged defects. One of the alleged defects was the absence of a transition arc. Jeppesen's only response to that allegation is that it had no power to alter the Government's procedure. As noted above, that is not a valid defense. Accordingly, we conclude that the plaintiffs introduced sufficient evidence to support a finding that the chart was defective.

2. *Negligence*

Jeppesen contends that it cannot be held liable for negligence on the facts presented at trial. The district court instructed the jury as follows:

> Now, one who supplies a product, either directly or through a third person, for another to use, which the supplier knows or has reason to know is dangerous or is likely to be dangerous for the use for which it is supplied, has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use if the supplier has reason to believe that they will not realize its dangerous condition. A failure to fulfill that duty is negligence. This rule applies to a producer of a product.
>
> The producer of a product that is reasonably certain to be dangerous if negligently made, has a duty to exercise reasonable care in the design, production, testing and inspection of the product and in the testing and inspection of any component parts made by another so that the product may be safely used in a manner and for a purpose for which it was made.
>
> A failure to fulfill that duty is negligence.

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to strict liability in tort. *E.g.*, *Petty v. United States*, 679 F.2d 719, 726 (8th Cir. 1982).

The district court's instructions correctly stated the law.[12] In light of Jeppesen's internal operating procedures, which required testing for completeness, and its failure to detect the defects in the instrument approach procedure, the jury could reasonably have found that Jeppesen was negligent in failing to warn users of the latent defects in the chart.

Jeppesen argues that it had no ability to change the procedure and that it had no duty to control the actions of the Government. Both arguments miss the point. The negligence theory was submitted to the jury on a "duty to test/duty to warn" theory, rather than on a "duty to control the Government" theory. Jeppesen can be held liable for negligently failing to detect the defect in the product that it marketed. If it had discovered the defect, Jeppesen would have been required either to warn the users of the chart or to refrain from selling the product.

3. *Public Policy Defenses*

Jeppesen asserts a first amendment privilege against liability based on commercial speech. Even assuming that this case involves commercial speech, however, it is well established that commercial speech is subject to many forms of regulation. *E.g., Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 455-56 (1978); *see* Faber, *Commercial Speech and First Amendment Theory,* 74 Nw. U.L. Rev. 372 (1979). The public may be protected from false or misleading commercial messages. *See Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 563 (1980). Requiring a chart manufacturer to produce a safe product would have no significant chilling effect

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[12] The manufacturer of a potentially hazardous product has a duty to conduct reasonable tests and inspections to detect latent defects. *Putensen v. Clay Adams, Inc.,* 12 Cal. App. 3d 1062, 1078, 91 Cal. Rptr. 319, 329 (1970); *see* 1 L. Frumer & M. Friedman, *Products Liability* § 6.01[1] (1984). The failure of the manufacturer to warn consumers of defects of which the manufacturer is or should be aware constitutes negligence. *Lunghi v. Clark Equipment Co.,* 153 Cal. App. 3d 485, 491-95, 200 Cal. Rptr. 387, 389-92 (1984); *Putensen,* 12 Cal. App. 3d at 1076-77, 91 Cal. Rptr. at 328; *see* 1A L. Frumer & M. Friedman, *supra,* § 8.01.

on freedom of speech. Accordingly, Jeppesen's tortious conduct was not privileged. *See Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975); *cf.* Note, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 Ind. L.J. 503 (1984) (discussing the more stringent standards applied to products liability claims against media defendants).

Jeppesen also claims a privilege under Cal. Civ. Code § 47(4). Section 47(4) only applies to reports in a "public journal." Jeppesen's charts are not a public journal.

C. *Prejudgment Interest*

1. *Right to a Jury Trial*

Jeppesen contends that the district court's award of prejudgment interest to the plaintiffs violated its right to a jury trial. Jeppesen notes that Cal. Civ. Code § 3288 leaves the decision to award prejudgment interest to the jury. The district court, however, based its award on Cal. Civ. Code § 3287(a), which does not require a jury determination. But even if Jeppesen had the right to a jury trial, it waived any objection to the district court's actions by failing to object at trial. The record reveals that Jeppesen has raised this issue for the first time on appeal.

2. *Availability of Prejudgment Interest*

Section 3287(a) provides, in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest thereon from that day." The plaintiffs claim that the value of the property damage to the aircraft was "capable of being made certain by calculation." The district court agreed and awarded prejudgment interest.

In order for damages to be "certain," it is not necessary that they be liquidated. All that is required is established or reasonably ascertainable market prices or values for the property destroyed. *Lineman v. Schmid*, 32 Cal. 2d 204, 212, 195 P.2d 408, 413 (1948). The fact that the plaintiff prays for an amount in excess

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of the actual award does not render damages uncertain. *Ferro v. Citizens National Trust & Savings Bank*, 44 Cal. 2d 401, 415-16, 282 P.2d 849, 857 (1955); *National Farm Workers Service Center, Inc. v. Caratan*, 146 Cal. App. 3d 796, 811, 194 Cal. Rptr. 617, 627 (1983).

In this case, the damages related to the destruction of the aircraft consist of four components: (1) the base value of the aircraft, (2) the value of a spare parts kit and other material aboard the aircraft, (3) the cost of recovering the remains of those aboard the aircraft, and (4) the value of various specific features or "extras" on board the aircraft. The value of the first, second, and third components is undisputed. The experts disagreed only on the value of the fourth component. Thus, the following damages were undisputed:

Destruction of the aircraft	$9,000,000
Spare parts kit, etc.	253,420
Expenses to recover remains	27,575
Total	$9,280,995

The jury awarded $9.3 million, which was only $19,005 more than the undisputed total. $9.3 million is also the figure suggested by Jeppesen's counsel in closing argument.

We agree with the district court's conclusion that the damages were certain. The mere fact that the amount of damages was in dispute is not dispositive. *Esgro Central, Inc. v. General Insurance Co.*, 20 Cal. App. 3d 1054, 1062-63, 98 Cal. Rptr. 153, 158 (1971). The only disputed issue was the value of the "extras." Even though the jury evidently rejected the plaintiffs' contentions regarding the "extras," the remaining components had reasonably ascertainable market values. Accordingly, the damages were sufficiently certain to justify an award of prejudgment interest. *See Caratan*, 146 Cal. App. 3d at 811, 194 Cal. Rptr. at 857.

III

CONCLUSION

The judgment of the district court is AFFIRMED.[13]

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[13] Jeppesen's motion to strike portions of the excerpts of record is denied.

Appendix B

United States Court of Appeals
For the Ninth Circuit

C.A. No. 83-2336

D.C. Nos. CV 74-1874, 74-1875,
74-1913, 75-0389, 75-1069,
75-1937, 76-0161 SC

Barbara A. Brocklesby, et al.,
Plaintiffs-Appellees,

vs.

United States of America,
Defendant-Appellee,

and

Jeppesen and Company,
Defendant-Appellant.

ORDER
[Filed Aug. 2, 1985]

Before: CANBY, NORRIS and BEEZER, Circuit Judges.

The previous disposition in this case is withdrawn and the following amended opinion is substituted.

The panel, having amended the opinion, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

United States Court of Appeals
For the Ninth Circuit

C.A. No. 83-2336

D.C. Nos. CV 74-1874, 74-1875,
74-1913, 75-0389, 75-1069,
75-1937, 76-0161 SC

Barbara A. Brocklesby, et al.,
Plaintiffs-Appellees,

vs.

United States of America,
Defendant-Appellee,

and

Jeppesen and Company,
Defendant-Appellant.

AMENDED OPINION
[Filed Aug. 2, 1985]

Argued and Submitted—December 11, 1984—
San Francisco, California

Appeal from the United States District Court
for the Northern District of California
Honorable Samuel Conti, District Judge, Presiding

Decided February 15, 1985;
Amended August 2, 1985

Before: CANBY, NORRIS and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Barbara Brocklesby, Nancy Evans, Frank Evans, Katherine Evans, Norma Chapman, and World Airways, Inc. (collectively "the plaintiffs") brought this action against the United States of America ("the Government") and Jeppesen and Company ("Jeppesen"), seeking damages for wrongful deaths and property damage arising from an airplane crash near Cold Bay, Alaska. In a bifurcated trial, the jury returned a verdict against Jeppesen. Before the district court disposed of claims against the Government, the Government settled with the plaintiffs. An order dismissing the Government was entered. Jeppesen appeals from

the jury verdict and seeks indemnification from the Government. We affirm.

I

BACKGROUND

On September 8, 1973, an aircraft owned by World Airways crashed into a mountain near Cold Bay Alaska, killing all six crew members and destroying the aircraft and its contents. World Airways and the survivors of the deceased crew members brought separate actions against the Government and Jeppesen, alleging, *inter alia,* that the accident was caused by defects in an instrument approach procedure developed by the Government and published by Jeppesen. The actions were consolidated for trial.

The Federal Aviation Administration ("FAA") designs and publishes standard instrument approach procedures. *See* 14 C.F.R. pt. 97. The FAA's instrument approach procedures are essentially compilations of data, which are set forth in tabular form. Jeppesen uses the FAA's data to portray the instrument approach procedures in graphic form. One of Jeppesen's charts depicts the instrument approach procedure to the Cold Bay, Alaska airport. On the flight at issue in this case, World Airways' pilot was using that chart.

Prior to trial, the Government and Jeppesen entered into a stipulation of compromise settlement ("the indemnity agreement"). The indemnity agreement resolved the claims between the Government and Jeppesen, subject to various conditions. One of the conditions required the parties to submit special interrogatories to the trier of fact. Over the defendants' objections, the district court admitted the indemnity agreement into evidence.

Because the claims against the Government were governed by the Federal Tort Claims Act, the plaintiffs had no right to a jury trial on those claims. *See* 28 U.S.C. § 2402. As a result, the trial was bifurcated, with a jury deciding the claims against Jeppesen and the court deciding the claims against the Government. The case was submitted to the jury under three theories: negligence, breach of warranty, and strict liability. The jury returned a general

verdict against Jeppesen in the amount of $11,630,000. The district court refused to submit special interrogatories to the jury involving the indemnity issues and later refused to answer the interrogatories itself.

Shortly after the district court refused to submit the interrogatories to the jury, the Government settled with the plaintiffs for $5 million. The Government was then dismissed from the suit. The district court denied a motion by Jeppesen to enforce the indemnity agreement.

The district court awarded prejudgment interest in the amount of $6,155,580.81 to World Airways with regard to its claim for the market value of the aircraft. After crediting the $5 million settlement, the district court entered a final judgment for $12,785,580.81 in favor of the plaintiffs and against Jeppesen.

II

ANALYSIS

A. *The Indemnity Agreement*

1. *Admissibility*

Federal Rule of Evidence 408 bars the admission of settlement agreements to prove liability. *See generally* 23 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5301-5315 (1980). The final sentence of Rule 408 provides the exception that is at issue in this case: "This rule . . . does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . ." Jeppesen contends that the only purpose for admitting the indemnity agreement was to prove liability and that the district court abused its discretion by allowing the plaintiffs to introduce it into evidence.[1]

The record does not support Jeppesen's position. At trial, the plaintiffs argued that the indemnity agreement was admissible for

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[1] We review the district court's decisions regarding the admission of evidence under the abuse of discretion standard. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258 n.5 (9th Cir. 1984).

two purposes. First, the plaintiffs argued that the indemnity agreement was admissible to show the relationship of the parties. The plaintiffs contended that the indemnity agreement showed that Jeppesen and the Government were not adverse.[2] Second, the plaintiffs argued that the indemnity agreement was admissible to attack the credibility of the witnesses for Jeppesen and the Government.[3] The district court admitted the indemnity agreement for those specific purposes.[4] Because those purposes are

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[2] Jeppesen argues that the relationship of the parties was not at issue. The test, however, is not whether the relationship of the parties was an operative fact in the case, but whether it was "relevant" within the meaning of Rule 401. Evidence relating to the relationship of the parties is relevant because it tends to make their respective positions less credible. *See Lewis v. Baker,* 526 F.2d 470, 475 (2d Cir. 1975). At a post-trial hearing, Jeppesen's trial counsel admitted that the indemnity agreement altered the relationship between the Government and Jeppesen:

> We didn't shoot at the government. I dropped two expert witnesses on the subject of the government's procedure in reliance on the fact that the government was going to pay if the jury found the procedure was bad.
>
> I argued in favor of the government, I supported their position, I didn't prosecute, *but the jury knew about the agreement the whole time, so nobody was fooled.* The jury knew from opening statements what our relationship was.

(emphasis added).

[3] Jeppesen argues that the indemnity agreement was not used for this purpose. The record reveals, however, that the indemnity agreement was introduced into evidence during the testimony of Wayne Rosenkrans, the president of Jeppesen. In any event, it was not necessary for the plaintiffs to confront each witness with the indemnity agreement. If the existence of the indemnity agreement made the defendants' witnesses' testimony less credible, it was admissible. *See County of Hennepin v. AFG Industries, Inc.,* 726 F.2d 149, 152-53 (8th Cir. 1984); 23 C. Wright & K. Graham, *supra,* § 5311.

[4] Jeppesen asserts that the district court allowed the plaintiffs to use the indemnity agreement for any purpose. The record reveals, however, that the district court admitted the indemnity agreement only for these

distinct from proving liability, the district court did not abuse its discretion by admitting the indemnity agreement.[5]

2. *Limiting Instruction*

Jeppesen contends that the district court committed reversible error by failing to instruct the jury that it could not consider the indemnity agreement as proof of liability. If a limiting instruction is not requested, any error from failure to give the instruction is waived. *Bock v. United States,* 375 F.2d 479, 480 (9th Cir. 1967); *see* Fed. R. Civ. P. 51. Because Jeppesen failed to request an instruction, this issue was not preserved for appeal.[6]

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two limited purposes. The record also reveals that Jeppesen never sought a limiting instruction, as is discussed below.

[5] Jeppesen also argues that the admission of the indemnity agreement was unfairly prejudicial because the jury could hold Jeppesen liable under the belief that the Government would indemnify Jeppesen. While that theory is not implausible, we note that Jeppesen did not contest the introduction of the indemnity agreement on the basis of unfair prejudice. *See* Fed. R. Evid. 403. Instead, Jeppesen based its objection solely on Rule 408 and general principles of relevance. Jeppesen never even mentioned unfair prejudice at trial. In fact, Jeppesen raised the issue of unfair prejudice for the first time in a motion filed after trial. In the absence of a specific and timely objection, we review the admission of evidence for plain error. Fed. R. Evid. 103(a)(1), (d); *see United States v. Wilson,* 690 F.2d 1267, 1273-74 (9th Cir. 1982), *cert. denied,* 104 S. Ct. 205 (1983); *cf. John McShain, Inc. v. Cessna Aircraft Co.,* 563 F.2d 632, 635 (3d Cir. 1977) (implying an objection under Rule 403 from a party's arguments under Rule 408). We conclude that the district court's decision to admit the indemnity agreement was not plain error.

[6] Jeppesen argues that its failure to request the instruction can be excused because the plaintiffs sought an identical instruction, which the district court rejected. The record does not support that argument. The "instruction" that the plaintiffs sought was part of the district court's initial statement to the jury prior to voir dire. None of the parties sought a limiting instruction at the time the evidence was admitted or at any other time.

3. *Enforceability*

Jeppesen claims that the district court erred by refusing to enforce the indemnity agreement. 28 U.S.C. § 1346(a)(2) gives district courts concurrent jurisdiction with the United States Claims Court over "[a]ny civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States." Because Jeppesen's claim against the United States under the indemnity agreement exceeds $10,000, the district court lacked jurisdiction. *Murray v. United States,* 405 F.2d 1361, 1366-67 (D.C. Cir. 1968); *see Keene Corp. v. United States,* 700 F.2d 836, 845 n.13 (2d Cir.), *cert. denied,* 104 S. Ct. 195 (1983); *Glover v. Johns-Manville Corp.,* 662 F.2d 225, 230-32 (4th Cir. 1981).

Because the issue of indemnity was not before the jury, the district court was not obligated to submit interrogatories on that issue. The district court concluded that submission of the interrogatories would be confusing and would create a possibility of inconsistent verdicts. The record reveals no grounds for finding that the district court abused its discretion.

4. *Due Process*

Jeppesen contends that the trial of this case was so fundamentally unfair that Jeppesen did not receive due process of law. We disagree. Jeppesen had a full and fair opportunity to present its case before the district court. If Jeppesen felt that the admission of the indemnity agreement was unfair, a timely and specific objection under Rule 403 or a request for a limiting instruction would have been appropriate.

Jeppesen also argues that the admission of the indemnity agreement deprived it of due process because the indemnity agreement eventually became unenforceable. Jeppesen contends that the trial was thus based on false evidence. We disagree. The indemnity agreement was admitted to show the relationship of the parties and to impeach witnesses. At the time of trial, the indemnity agreement was an accurate reflection of the relationship of the parties and the biases, if any, of the witnesses. While the indemnity agreement would have been "false" if it had been admitted to prove that the Government would indemnify Jep-

pesen, it was not admitted for that purpose. We reject Jeppesen's due process claims.

B. *Liability*

The case was submitted to the jury on three theories of liability: strict liability, breach of warranty, and negligence.[7] The jury returned a general verdict against Jeppesen. Accordingly, the judgment must be reversed if any of the three theories is legally defective. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Jones v. Miles*, 656 F.2d 103, 106 (5th Cir. 1981). Jeppesen argues (1) that this case does not involve a defective "product" for purposes of strict liability, (2) that the defects in the Government's instrument approach procedure will not support a finding of strict liability against Jeppesen, (3) that the evidence produced at trial does not establish negligence, and (4) that various policy considerations bar any tort liability in this case.[8]

1. *Strict Products Liability*

a. *The Existence of a "Product"*

Jeppesen argues that the Government's instrument approach procedure is not a "product" within the meaning of *Restatement (Second) of Torts* § 402A (1965). While that may be true, it misses the point. The issue is whether Jeppesen's chart is a product, not whether the instrument approach procedure is a product. In *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 642

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[7] Although the district court never made a finding regarding its choice of law, the parties assume that California law applies. California conflict of laws principles govern this choice. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). We conclude that the California courts would apply California law to this case. *See Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972). *See generally* R. Weintraub, *Commentary on the Conflict of Laws* § 6.29 (2d ed. 1980) (discussing choice of law problems in products liability cases).

[8] Jeppesen only challenges the breach of warranty theory on the ground that the chart was not a "product."

F.2d 339, 341-42 (9th Cir. 1981) (applying Nevada law), we analyzed the problem as follows:

> Jeppesen approach charts depict graphically the instrument approach procedure for the particular airport as that procedure has been promulgated by the Federal Aviation Administration (FAA) after testing and administrative approval. The procedure includes all pertinent aspects of the approach such as directional heading, distances, minimum altitudes, turns, radio frequencies and procedures to be followed if an approach is missed. The specifications prescribed are set forth by the FAA in tabular form. Jeppesen acquires this FAA form and portrays the information therein on a graphic approach chart. This is Jeppesen's "product."

Accord Saloomey v. Jeppesen & Co., 707 F.2d 671, 676-77 (2d Cir. 1983) ("Though a 'product' may not include mere provision of architectural design plans or any similar form of data supplied under individually-tailored service arragements, . . . the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts.") (applying Colorado law). We agree with the plaintiffs' position that Jeppesen's chart was a defective product for purposes of analysis under section 402A.[9]

b. *Liability for Defects in the Government's Procedure*

This case is distinguishable from *Aetna* and *Saloomey* because the Jeppesen chart involved in this case accurately portrayed the instrument approach procedure provided by the Government. All of the defects in the Jeppesen chart stem from the Government's

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[9] We do not address Jeppesen's claim that the First Amendment renders the theory of strict liability for a defective product inapplicable to published material such as its charts. The general rule is that an issue will not be considered for the first time on appeal. *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652, 655 (9th Cir. 1984). Since Jeppesen did not raise the First Amendment argument at any time below and did not object to the jury instructions on strict liability except by implication in summary judgment proceedings, Jeppesen has not properly preserved for appeal this objection to the jury instructions.

alleged failure to establish a safe instrument approach procedure. The district court instructed the jury as follows:

> Now, the fact that Jeppesen's instrument approach charts are based on information which is supplied by the F.A.A. and which Jeppesen cannot deviate from or modify does not relieve Jeppesen from liability if a defect in the Jeppesen chart was a proximate cause of the accident. The manufacturer of a product is strictly liable for defects in that product even though the defect can be traced to a component part supplied by another. Thus if you find that Jeppesen's instrument approach chart is defective and that the defect was a proximate cause of the accident, you must find Jeppesen liable even if the defect exists only because you find that the F.A.A. designed an approach procedure that you find is itself defective. The issue is: was the Jeppesen chart defective?

The validity of that instruction presents a case of first impression.

Jeppesen contends that strict liability is inappropriate because the Government's procedure was beyond its control.[10] In essence, Jeppesen is arguing that it should not be held strictly liable because it is without fault in this case. It is beyond doubt that the concept of fault continues to have a role in strict liability law. *See* Powers, *The Persistence of Fault in Products Liability,* 61 Texas L. Rev. 777 (1983). Nevertheless, Jeppesen's position is untenable.

Initially, we note that Jeppesen had at least some ability to prevent injuries to users of its charts. Jeppesen's production

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[10] Jeppesen's position resembles the "contract specifications" defense. Under the contract specifications defense, a manufacturer cannot be held liable for producing a product in accordance with specifications that are beyond its control. *See* Note, *Liability of a Manufacturer for Products Defectively Designed by the Government,* 23 B.C.L. Rev. 1025, 1032-48 (1982). The California courts have rejected the application of this defense to strict liability claims. *Rawlings v. D.M. Oliver, Inc.,* 97 Cal. App. 3d 890, 896-97, 159 Cal. Rptr. 119, 121-22 (1979); *accord Challoner v. Day & Zimmerman, Inc.,* 512 F.2d 77, 82-83 (5th Cir.), *vacated on other grounds,* 423 U.S. 3 (1975); *see* Note, *supra,* at 1039-43.

specifications manual required its employees to research any procedure thoroughly "to determine its validity and completeness." Jeppesen's president, Wayne Rosenkrans, testified that this requirement applied to the construction and composition of charts such as the one involved in this case. Jeppesen's manual requires its employees to contact official sources to resolve apparent discrepancies in information. Jeppesen maintained an office in Washington, D.C. with liaison to the FAA. Rosenkrans testified that Jeppesen's actions had led to changes in Government procedures. Accordingly, Jeppesen had both the ability to detect an error and a mechanism for seeking corrections. Under these circumstances, we reject Jeppesen's argument that the Government's procedure was completely beyond Jeppesen's control.

More fundamentally, however, existing products liability law is contrary to Jeppesen's position. Assuming that the Government's instrument approach procedure was defective, the literal requirements of section 402A are met. Jeppesen's chart was a "product in a defective condition unreasonably dangerous to the user" within the meaning of section 402A(1). Section 402A(2)(a) provides that strict liability is appropriate even though "the seller has exercised all possible care in the preparation and sale of his product." A seller is strictly liable for injuries caused by a defective product even though the defect originated from a component part manufactured by another party. *E.g., Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964); *see Prosser and Keeton on the Law of Torts* § 100, at 705 (W. Keeton 5th ed. 1984). Accordingly, the appropriate focus of inquiry is not whether Jeppesen caused the product to be defective, but whether the product was in fact defective. *See Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

The concept of fault has persisted in substantive products liability law primarily in determining whether a defective product is "unreasonably dangerous." *See* Powers, *supra*, at 781-97. We note that the California courts have sought to purge the concept of fault from strict liability law by focusing on the existence of a defect, rather than inquiring whether the product is unreasonably dangerous. *E.g., Barker v. Lull Engineering Co.*, 20 Cal. 3d 413,

422- ., 573 P.2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 127-35, 501 P.2d 1153, 1158-63, 104 Cal. Rptr. 433, 438-43 (1972). To the extent that Jeppesen's product was defective, the case law does not support an attempt to relieve Jeppesen of liability on the ground that the defect was not Jeppesen's fault. Comment *c* to section 402A of the *Restatement (Second) of Torts* states the policies underlying strict products liability as follows:

> [T]he justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the product.

See also Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring). All of those policies apply to the plaintiffs' claim in this case. To the extent that Jeppesen is held liable for the Government's misfeasance, Jeppesen had a right to seek tort law indemnification.[11] The fact that Jeppesen failed to seek tort law indemnification has no bearing on the plaintiffs' substantive rights.

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[11] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983); *see* 28 U.S.C. § 2674. Of course, the Government is not subject to strict liability in tort. *E.g.*, *Petty v. United States*, 679 F.2d 719, 726 (8th Cir. 1982).

c. *Sufficiency of the Evidence*

Jeppesen contends that the evidence presented at trial did not prove that the chart was defective. The plaintiffs produced evidence regarding several alleged defects. One of the alleged defects was the absence of a transition arc. Jeppesen's only response to that allegation is that it had no power to alter the Government's procedure. As noted above, that is not a valid defense. Accordingly, we conclude that the plaintiffs introduced sufficient evidence to support a finding that the chart was defective.

2. *Negligence*

Jeppesen contends that it cannot be held liable for negligence on the facts presented at trial. The district court instructed the jury as follows:

> Now, one who supplies a product, either directly or through a third person, for another to use, which the supplier knows or has reason to know is dangerous or is likely to be dangerous for the use for which it is supplied, has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use if the supplier has reason to believe that they will not realize its dangerous condition. A failure to fulfill that duty is negligence. This rule applies to a producer of a product.
>
> The producer of a product that is reasonably certain to be dangerous if negligently made, has a duty to exercise reasonable care in the design, production, testing and inspection of the product and in the testing and inspection of any component parts made by another so that the product may be safely used in a manner and for a purpose for which it was made.
>
> A failure to fulfill that duty is negligence.

The district court's instructions correctly stated the law.[12] In light of Jeppesen's internal operating procedures, which required test-

[12] The manufacturer of a potentially hazardous product has a duty to conduct reasonable tests and inspections to detect latent defects. *Puten-*

ing for completeness, and its failure to detect the defects in the instrument approach procedure, the jury could reasonably have found that Jeppesen was negligent in failing to warn users of the latent defects in the chart.

Jeppesen argues that it had no ability to change the procedure and that it had no duty to control the actions of the Government. Both arguments miss the point. The negligence theory was submitted to the jury on a "duty to test/duty to warn" theory, rather than on a "duty to control the Government" theory. Jeppesen can be held liable for negligently failing to detect the defect in the product that it marketed. If it had discovered the defect, Jeppesen would have been required either to warn the users of the chart or to refrain from selling the product.

3. *Public Policy Defenses*

Jeppesen argues that it is unfair to hold a chart manufacturer strictly liable for accurately republishing a government regulation. We agree. If, for example, a trade journal had accurately published the government's instrument approach procedure in text form and a pilot had used the procedure as printed in the journal, the journal would be immune from strict liability. This case, however, does not present that situation. Jeppesen's charts are more than just a republication of the text of the government's procedures. Jeppesen converts a government procedure from text into graphic form and represents that the chart contains all necessary information. For example, Jeppesen's catalog contains the following statements:

> When pilots compare approach plates . . . for information, for readibility . . . they choose Jeppesen. Why? Because the format of Jeppesen charts was designed by pilots, for pilots, and

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sen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 1078, 91 Cal. Rptr. 319, 329 (1970); *see* 1 L. Frumer & M. Friedman, *Products Liability* § 6.01[1] (1984). The failure of the manufacturer to warn consumers of defects of which the manufacturer is or should be aware constitutes negligence. *Lunghi v. Clark Equipment Co.*, 153 Cal. App. 3d 485, 491-95, 200 Cal. Rptr. 387, 389-92 (1984); *Putensen*, 12 Cal. App. 3d at 1076-77, 91 Cal. Rptr. at 328; *see* 1A L. Frumer & M. Friedman, *supra*, § 8.01.

> has been time-tested and proven by instrument pilots throughout the world. Every necessary detail is clearly indicated....
>
> Jeppesen approach plates include ... EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.

It is true that the government's procedures are significant components of Jeppesen's charts. It is apparent, however, that Jeppesen's charts are more than a mere republication of the government's procedures. Indeed, Jeppesen's charts are distinct products. As the manufacturer and marketer of those products, Jeppesen assumed the responsibility for insuring that the charts are not unreasonably dangerous in their intended use.

Jeppesen also claims a privilege under Cal. Civ. Code § 47(4). Section 47(4) only applies to reports in a "public journal." Jeppesen's charts are not a public journal.

C. *Prejudgment Interest*

1. *Right to a Jury Trial*

Jeppesen contends that the district court's award of prejudgment interest to the plaintiffs violated its right to a jury trial. Jeppesen notes that Cal. Civ. Code § 3288 leaves the decision to award prejudgment interest to the jury. The district court, however, based its award on Cal. Civ. Code § 3287(a), which does not require a jury determination. The availability of prejudgment interest under Section 3287(a) is primarily a question of law. As discussed below, we agree with the district court's conclusion that the plaintiffs were entitled to an award of prejudgment interest as a matter of law.

2. *Availability of Prejudgment Interest*

Section 3287(a) provides, in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest thereon from that day." The plaintiffs claim that the value of the property damage to the aircraft was "capable of being made certain by

calculation." The district court agreed and awarded prejudgment interest.

In order for damages to be "certain," it is not necessary that they be liquidated. All that is required is established or reasonably ascertainable market prices or values for the property destroyed. *Lineman v. Schmid,* 32 Cal. 2d 204, 212, 195 P.2d 408, 413 (1948). The fact that the plaintiff prays for an amount in excess of the actual award does not render damages uncertain. *Ferro v. Citizens National Trust & Savings Bank,* 44 Cal. 2d 401, 415-16, 282 P.2d 849, 857 (1955); *National Farm Workers Service Center, Inc. v. Caratan,* 146 Cal. App. 3d 796, 811, 194 Cal. Rptr. 617, 627 (1983).

In this case, the damages related to the destruction of the aircraft consist of four components: (1) the base value of the aircraft, (2) the value of a spare parts kit and other material aboard the aircraft, (3) the cost of recovering the remains of those aboard the aircraft, and (4) the value of various specific features or "extras" on board the aircraft. The value of the first, second, and third components is undisputed. The experts disagreed only on the value of the fourth component. Thus, the following damages were undisputed:

Destruction of the aircraft	$9,000,000
Spare parts kit, etc.	253,420
Expenses to recover remains	27,575
Total	$9,280,995

The jury awarded $9.3 million, which was only $19,005 more than the undisputed total. $9.3 million is also the figure suggested by Jeppesen's counsel in closing argument.

We agree with the district court's conclusion that the damages were certain. The mere fact that the amount of damages was in dispute is not dispositive. *Esgro Central, Inc. v. General Insurance Co.,* 20 Cal. App. 3d 1054, 1062-63, 98 Cal. Rptr. 153, 158 (1971). The only disputed issue was the value of the "extras." Even though the jury evidently rejected the plaintiffs' contentions regarding the "extras," the remaining components had reasonably ascertainable market values. Accordingly, the damages were suffi-

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ciently certain to justify an award of prejudgment interest. *See Caratan*, 146 Cal. App. 3d at 811, 194 Cal. Rptr. at 857.

III

CONCLUSION

The judgment of the district court is AFFIRMED.[13]

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[13] Jeppesen's motion to strike portions of the excerpts of record is denied.